

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

**NOTICE**

June 4, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

**No. 96-2170**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**SCOTT M. MALCOLM,**

**PLAINTIFF-RESPONDENT,**

**V.**

**STATE OF WISCONSIN LABOR AND INDUSTRY REVIEW  
COMMISSION,**

**DEFENDANT-APPELLANT,**

**WISCONSIN BELL, INC., A/K/A AMERITECH,**

**DEFENDANT.**

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APPEAL from an order of the circuit court for Waukesha County:  
ROGER MURPHY, Judge. *Reversed.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

PER CURIAM. The Labor, Industry and Review Commission (LIRC) appeals from a circuit court order setting aside LIRC's decision affirming an administrative law judge's decision to deny unemployment compensation benefits to Scott M. Malcolm on the ground that Malcolm was terminated by Wisconsin Bell, Inc., a/k/a Ameritech, for misconduct. Because we conclude that the trial court erred in setting aside LIRC's decision, we reverse.

Malcolm was employed as a systems technician for Wisconsin Bell for over twenty-two years before he was terminated on May 17, 1995. Wisconsin Bell terminated him for falsifying time sheets and not accounting for time away from his assigned job sites. Malcolm and a supervisor testified at the administrative hearing on Malcolm's unemployment compensation claim. The administrative law judge (ALJ) found that Malcolm

fail[ed] to properly report work time on his time sheet for days when he did not report to work in a timely manner, left work early and left the job site for a substantial length of time [and] evinced a willful and substantial disregard of the employer's interests and of the standards of behavior which the employer had a right to expect of him such as to be deemed misconduct connected with his employment.

The ALJ found that there was "substantial, credible evidence of a nonhearsay nature to support the findings that [Malcolm] was not working on the dates specified ...."

LIRC affirmed the ALJ, finding that Malcolm's explanations of how he spent his time on the days questioned by his employer were not credible. LIRC found that the employer presented sufficient credible evidence to permit a finding that Malcolm was not working when he said he was. Malcolm appealed to the circuit court and the circuit court reversed LIRC<sup>1</sup> because Malcolm had been

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<sup>1</sup> The reversal occurred in a Supplementary Memorandum Decision and Order.

unable to effectively present his case to the ALJ due to his pro se status and that his inability to present newly discovered evidence resulted in an unfair denial of unemployment compensation benefits. The court found that the supervisor's testimony against Malcolm was largely hearsay and that the agency's decision was not supported by substantial and credible nonhearsay evidence.

LIRC's findings of fact are conclusive on appeal so long as they are supported by credible and substantial evidence. *See* § 102.23(6), STATS.; *see also Applied Plastics, Inc. v. LIRC*, 121 Wis.2d 271, 276, 359 N.W.2d 168, 171 (Ct. App. 1984). Credible evidence is that which excludes speculation and conjecture. *See Bumpas v. DILHR*, 95 Wis.2d 334, 343, 290 N.W.2d 504, 508 (1980). Substantial evidence is not a preponderance of evidence, but relevant evidence which a reasonable mind might accept as adequate to support a conclusion. *See Bucyrus-Erie Co. v. DILHR*, 90 Wis.2d 408, 418, 280 N.W.2d 142, 147 (1979).

We do not evaluate conflicting evidence to determine which should be accepted; we will affirm if there is credible evidence to support the finding regardless of whether there is evidence to support the opposite conclusion. *See Valadzic v. Briggs & Stratton Corp.*, 92 Wis.2d 583, 592-94, 286 N.W.2d 540, 544-45 (1979). If reasonable minds could arrive at the same conclusion reached by LIRC, the credible evidence test is met. *See Farmers Mill of Athens, Inc. v. DILHR*, 97 Wis.2d 576, 579, 294 N.W.2d 39, 41 (Ct. App. 1980). The credibility of witnesses and the persuasiveness of testimony are within the province of LIRC. *See* § 102.23(6), STATS.; *see also Goranson v. DILHR*, 94 Wis.2d 537, 554, 289 N.W.2d 270, 278 (1980).

Our review of the record before LIRC reveals that there is credible and substantial evidence of Malcolm's misconduct to support LIRC's denial of

unemployment compensation benefits.<sup>2</sup> Jerome Polasky, Ameritech's area manager of construction within whose department Malcolm worked, testified that he personally observed Malcolm's absences from assigned work sites on at least three occasions (April 4 and 5 and May 12, 1995) and received reports of Malcolm's absences from Gary Haberman who was assigned to track Malcolm's whereabouts over several days from April 26 to May 12, 1995. Polasky also testified that Malcolm's explanations for his absences were not believable.

The ALJ found Polasky's testimony more credible than Malcolm's explanations of his whereabouts on the dates and times cited by Polasky. Our review of the record indicates that the ALJ permitted Malcolm to respond to each claimed absence from his assigned work site and that Malcolm cross-examined Polasky. The ALJ gave a full airing to Malcolm's claim that he could account for his time and was not completing time sheets for time not devoted to his employer's service. The ALJ (and LIRC) rejected Malcolm's explanations of repeated visits to a supply station and undocumented claims of how he spent time away from the work site. We are bound by this credibility determination and the circuit court erred in setting it aside. Although competing inferences can be drawn from the evidence before the ALJ, we are bound by LIRC's inferences because they are supported by substantial and credible evidence in the record.

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<sup>2</sup> Under § 108.04(5), STATS., 1993-94:

An employe whose work is terminated by an employing unit for misconduct connected with the employe's work is ineligible to receive benefits until 7 weeks have elapsed since the end of the week in which the discharge occurs and the employe earns wages after the week in which the discharge occurs equal to at least 14 times the employe's weekly benefit rate ....

We will address the trial court's specific reasons for setting aside LIRC's decision. The trial court set aside LIRC's decision because it was premised on Polasky's hearsay testimony relating Haberman's observations of Malcolm's absences. Evidentiary questions at an administrative hearing are governed by administrative rules established by the department. *See* § 108.09(5)(a), STATS. Under those rules, hearsay is admissible if it has probative value, although no finding disposing of an issue may be based solely on hearsay unless such is admissible under ch. 908, STATS. *See* WIS. ADM. CODE § ILHR 140.12(1).

Here, the ALJ had Polasky's first-hand account of Malcolm's absences on April 4 and 5 and May 12, 1995. We do not conclude that LIRC's decision was premised solely on hearsay evidence.

Contrary to the trial court's view of the record, we conclude that Malcolm received a fair hearing at the administrative level. Malcolm's pro se status did not substantially contribute to the decision against him. As noted above, the rules of evidence do not apply in administrative hearings and the ALJ gave Malcolm's claims a full airing.

The trial court also focused on the fact that Malcolm located evidence he contended was "newly discovered" and that his pro se status hampered his ability to present this evidence in the administrative proceeding. This evidence consisted of written statements from three people with whom Malcolm had contact on the dates his employer contended he was absent from the job site. While there is a provision for LIRC to act on newly discovered evidence, *see* § 108.09(6)(c) and (d), STATS., Malcolm did not seek such relief. Rather, he submitted what he alleged to be newly discovered evidence to the trial court whose review was limited to the record created before LIRC. *See Hoell v. LIRC*,

186 Wis.2d 603, 612, 522 N.W.2d 234, 238 (Ct. App. 1994). This evidence was not properly before the trial court.

The record does not substantiate that Malcolm's failure to present newly discovered evidence to LIRC is attributable to his pro se status. During the hearing, Malcolm stated that he chose not to locate and subpoena the three individuals to appear at the administrative hearing. He later submitted letters from the individuals to the trial court contending that they were recently obtained.

The record reveals that Malcolm knew these individuals might have evidence which could assist him in rebutting the employer's claims but chose not to present it to the ALJ. While pro se litigants in some circumstances deserve some leniency with regard to waiver of rights, the rule applies only to pro se prisoners. *See Waushara County v. Graf*, 166 Wis.2d 442, 451, 480 N.W.2d 16, 19 (1992). The right to proceed pro se does not excuse compliance with relevant rules of procedural and substantive law. *See id.* at 451-52, 480 N.W.2d at 20.

The trial court erred in setting aside LIRC's decision. Accordingly, we reverse the trial court and reinstate LIRC's decision.

*By the Court.*—Order reversed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

